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The Reverberations of Achmea on International Law and ISDS: Lessons From the 10th Annual EFILA Conference for the Next Decade

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The *Achmea* judgment of the Court of Justice of the EU ("CJEU") declaring intra-EU investment arbitration contrary to EU law has been hotly debated (see previous KAB posts here), but ever since, the post-*Achmea* effects have echoed over the years through EU policies, jurisprudence on intra-EU and non-EU ISDS cases, and in courtrooms where enforcement proceedings for intra-EU awards unfold.

The 10th Annual European Federation for Investment Law and Arbitration ("EFILA") Conference, hosted by the London office of Herbert Smith Freehills on 29 April 2025, gathered global thought leaders and practitioners who traversed the globe to explore how *Achmea* and EU law continue to permeate investment law and arbitration, as they intersect with global conflicts, sanctions, and energy transition amidst shifting global economic powers.

"Old Treaties, New Outcomes"

To set the stage, the keynote speaker, Prof. Dr. Gerard Meijer (Linklaters), provided a clear-eyed reminder that the vast majority of past and present ISDS cases continue to be based on old-generation BITs, pending the entry into force of modernized EU investment treaties. In the meantime, he suggested alternative avenues for arbitral tribunals to apply other international norms on climate change, energy transition, and human rights issues, citing the Dutch landmark cases (*Urgenda*) against The Netherlands and *Shell*, which were brought before Dutch courts by NGOs.

He argued that arbitral tribunals could systematically integrate the emerging energy transition and climate change standards by relying on the Vienna Convention on the Law on Treaties ("VCLT") as the center of gravity pulling the strings of international law, including binding State commitments, as well as soft law instruments.

Global Impacts of Post-*Achmea* EU Policies: A Glimpse into a More Dynamic World

Non-EU courts remain unimpressed with *Achmea*-based jurisdictional objections, limiting the decision's impact to within the EU. This is particularly emphasized in the renewable energy ISDS cases under the Energy Charter Treaty ("ECT") (despite the *Komstroy* judgment of the CJEU), the EU's withdrawal from the ECT coordinated with some EU Member States, and its Declaration retroactively denying any legal effects of the ECT in intra-EU disputes.

Meanwhile, outside the EU, States are reinforcing the legal and institutional capacities to navigate the global challenges of tariffs, sanctions, and climate change. In this sense, new treaty standards and dispute resolution tools are emerging, somewhat ironically, from the EU-driven "crusade" against ISDS.

Following the thought-provoking keynote, the first panel engaged specific post-*Achmea* treaty practices reflecting these shifting tides. Stephanie Collins (Gibson Dunn) highlighted the EU-Mercosur free trade agreement (which does not contain provisions on investment protection) or the Global Agreement with Mexico (which adopts the CETA model). The EU, thus, continues to include the investment court system in new treaties, although its treaties featuring this mechanism—i.e., those with Canada, Vietnam, and Singapore—have still not entered into force. The narrower investment protections, along with an untested dispute resolution mechanism, reflect an idealistic policy direction, "detached from commercial realities" in the words of Hannah Ambrose (Herbert Smith Freehills).

Post-Brexit UK investment policies reflected a more reality-based approach, even though the UK subscribed on paper to the BIT terminations without effectuating its objectives. Rather, as Ms. Ambrose explained, the UK continues a more strategic use of ISDS, as reflected in its accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") and maintenance of over eighty of its old or unmodernized BITs.

True to their counterproductive form, the EU obstructed the modernization of the ECT which it promoted and formulated, only to withdraw from the original ECT (along with some EU Member States), without any alternative EU policy fit for the energy transition or the new realities of global energy supply. What the EU left behind, however, was the "greenest" international investment treaty in the energy sector, with actionable compliance provisions for climate change and sustainable development standards, increased transparency for ISDS, and a State-to-State accountability mechanism for violations of its climate change provisions. As Ms. Collins noted, the ECT itself will continue to be relevant outside of the EU in over 40 remaining Contracting Parties and in emerging regions, such as Africa.

The EU also has an eye on "protecting" its sole powers to interpret EU law in sports and commercial arbitration, drawing on matters of public policy (such as competition law, environmental protection standards, and ESG). Here, Anya George (Schellenberg Wittmer) highlighted some prominent sports arbitration cases, such as *International Skating Union v. European Commission* and *Royal Football Club Seraing v. FIFA*. Dr. Maria Fogdestam Agius further examined the trends in the commercial arbitration space. Both warned about the risk of increased public scrutiny in private cases. Other alternatives to intra-EU arbitration, such as the European Court for Human Rights (ECHR) or contract-based mechanisms, were also raised as possibilities, but certainly more limited, recourse for claimant investors.

International Perspectives

The second panel picked up from the perspective of the global, multilateral system of rules and alliances spearheaded by the U.S. in the post-World War II era. In light of the more recent turbulence in international trade and investment policies under the new administration, that same system is deeply shaken as it continues to hold up the existing ISDS framework. Against this background, Henry Smith (Control Risks) highlighted regulatory instability as a growing space for alternative sources of power and legitimacy, but also for more conflicts.

In sharp contrast, U.S. courts (particularly the 2024 Decision in the Spanish renewable energy saga enforcement proceedings against Spain) remained steady in compliance with U.S. international commitments under the New York and ICSID Conventions. Carlos Ramos Msrsovsky (Baker Hostetler) outlined the U.S. Court of Appeals for the District of Columbia Circuit's affirmation of the validity of the underlying arbitration agreements in the ECT as viable exceptions to sovereign immunity under U.S. law, indicating a more positive outlook for future enforcement of intra-EU awards in the U.S.

Africa is also emerging as an attractive investment destination, holding 30% of global critical minerals reserves, most of which are crucial for renewable energy technologies, including 50% of cobalt and platinum. As Saadia Bhatty (Gide) illustrated, Africa is also becoming a trend-setter in robust treaty design, ensuring its increased rule-making role in investment law. This new legal and institutional framework will shape the outcomes of the growing number of ISDS claims against African States (currently 20% of ICSID cases). For future disputes, Ms. Bhatty noted the embrace of dispute prevention and amicable settlement methods in recent African BITs, which should help continue key renewable energy projects, but also stave off disputes.

Finally, Alexander Leventhal (Quinn Emanuel) rounded up and affirmed the dynamic trends outside of the EU by outlining the increased treaty-making activities in the Global South, as the EU has effectively terminated over 130 BITs. While the new treaties are protective of a State's right to regulate and include climate change obligations, they also severely limit investment protection and access to ISDS (as is the case, for example, in the India-UAE BIT).

The Impact of the New U.S. Administration's Trade and Investment Agenda for Europe and Beyond

Finally, the impact of the recent regressive U.S. trade and investment policies brought the discussion back to Europe, focusing on the possible legal and economic effects it will project onto future policies. Looking at the Baltics, Prof. Dr. Solveiga Vil?inskait? (TGS Baltic) noted that the economic impacts of the shifting dynamics can be overcome in light of historical experiences with Russia-related measures. However, the harmful precedents undermining international law pose a higher risk, and must be upheld, starting with the UN Charter Foundational principles, as stressed by Iana Dreyer (Founder & Editor of Borderlex).

Striking a more forceful tone, Arne Fuchs (Ashurst) described the existing U.S. and EU subordination of international law as "moral disasters" as the system is confronted with a "multidimensional crisis." Importantly, Mr. Fuchs observed shifts in investor attitudes under these circumstances, as they proactively seek treaty protections and risk insurance. This seems to reaffirm the stabilizing effects of international norms in severely challenging times.

With an eye on the future recovery of Ukraine, Marie Talasova (Wolf Theiss) proposed concrete steps the EU should take to support the country in this process. Primarily, this would include encouraging new investments in Ukraine, monetizing frozen assets through its existing mechanisms, and bolstering its legal and institutional frameworks through capacity development and legal reform. In this sense, Ms. Talasova stressed that international arbitration could be a confidence-building factor.

Messages for the International Legal Order for the Next Decade: "Do What is Right, Act with Conviction"

The shapeshifting and disruptive policies of the EU and the U.S. in recent years have shaken the foundations of trusted international legal norms, but they continue to stand tall, right outside and beyond the EU's borders. True to its mission, the 10th Annual EFILA Conference left the participants with inspiration and renewed motivation to continue reinventing and reinforcing international investment law, even as the "long shadow" of *Achmea* and EU law continue to give shade to a thriving international legal order.

The full program and list of speakers and panel moderators are available here.

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